

1                   IN THE SUPREME COURT OF THE UNITED STATES  
2   - - - - - x  
3   DAVID B. PASQUANTINO,                   :  
4   CARL J. PASQUANTINO, AND               :  
5   ARTHUR HILTS,                         :  
6                   Petitioners,               :  
7           v.                               :   No. 03-725  
8   UNITED STATES OF AMERICA,             :  
9                   Respondent.               :  
10  - - - - - x  
11   Washington, D.C.  
12   Tuesday, November 9, 2004  
13                   The above-entitled matter came on for oral  
14   argument before the Supreme Court of the United States at  
15   11:13 a.m.  
16   APPEARANCES:  
17   LAURA W. BRILL, ESQUIRE, ESQ., Los Angeles; on behalf of  
18       the Petitioners.  
19   MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General,  
20       Department of Justice, Washington, D.C.; on behalf  
21       of the Respondent.  
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P R O C E E D I N G S

[11:13 a.m.]

JUSTICE STEVENS: We'll hear argument in the case of Pasquantino against the United States.

Ms. Brill?

ORAL ARGUMENT OF LAURA W. BRILL  
ON BEHALF OF PETITIONERS

MS. BRILL: Justice Stevens, and may it please the Court:

There are five primary reasons why this prosecution is outside the scope of anything Congress has authorized. First, the government's interpretation of the wire fraud statute is inconsistent with the revenue rule. Second, it turns the rule of lenity on its head by allowing the government to incarcerate petitioners for 57 months for conduct that has never given rise to civil liability in this country. Third, this prosecution contravenes our national policy of demanding reciprocity in matters of international tax enforcement. Fourth, the government acknowledged below that it cannot bring this prosecution without disregarding another act of Congress, the Mandatory Victims Restitution Act, which is, as the name specifies, mandatory. And, fifth, under this Court's decisions in McNally and Cleveland, the wire fraud statute applies only to schemes aimed at defrauding a victim into

1     relinquishing something that it holds as money or  
2     property. A sovereign's interest in an unassessed tax  
3     claim is neither money nor property.

4             JUSTICE O'CONNOR: Well, can you look at the  
5     interest of the government as one of not allowing U.S.  
6     territory to be used to carry out a smuggling scheme? I  
7     mean, why does it have to be viewed as one of trying to  
8     enforce some other nation's tax laws?

9             MS. BRILL: Justice O'Connor, the government's  
10    interest in prosecuting somebody does not define the scope  
11    of what the statute at issue proscribes.

12            JUSTICE O'CONNOR: It's a wire fraud statute  
13    dealing with the use of communications capacity in this  
14    country to carry out a scheme designed to enable smuggling  
15    of goods.

16            MS. BRILL: Well, if the -- if the statute was  
17    not written as it is -- the statute, as written, uses the  
18    words "defraud" and the word -- the word "property," and  
19    both of those terms are terms that this Court has defined  
20    very narrowly. In Nader, it defined a "fraud" as --

21            JUSTICE SCALIA: Ms. Brill, I thought your brief  
22    said that we have an anti-smuggling statute, which is  
23    directed precisely against smugglers, but it only applies  
24    to those countries that have similar protection for us.

25            MS. BRILL: Yes, Justice --

1 JUSTICE SCALIA: And Canada does not.

2 MS. BRILL: Yes, Justice Scalia, that's exactly

3 --

4 JUSTICE SCALIA: Now --

5 MS. BRILL: -- correct.

6 JUSTICE SCALIA: -- the existence of that

7 statute would seem to suggest -- and a statute which is

8 limited to countries that will do the same for us -- would

9 seem to suggest that we don't want to do this for Canada.

10 MS. BRILL: Yes, that's exactly -- that's

11 exactly right, Your Honor. There --

12 JUSTICE GINSBURG: But it's also limited to

13 vessels. It's smuggling by water, not smuggling by --

14 MS. BRILL: By automobile.

15 JUSTICE GINSBURG: -- vehicles, as is done here,

16 so that we don't have any statute that covers smuggling on

17 land.

18 MS. BRILL: Right. Yes, Your Honor, that's

19 correct.

20 JUSTICE SCALIA: Is there something better about

21 reciprocity for vessels and not reciprocity for land

22 smuggling?

23 MS. BRILL: I think it just evinces what

24 Congress was concerned about most at the time, Justice

25 Scalia, but it was -- it is certainly the case that in any

1 -- any time that this country has endeavored to deal with  
2 matters of international tax enforcement, it has always  
3 demanded reciprocity. It has done so through the  
4 smuggling statute, it has done so through the numerous tax  
5 treaties that the Second Circuit's RJR decision discusses  
6 at length.

7           And one of the points the RJR decision makes is  
8 that, in 1951, at the very time that Congress was looking  
9 at the wire fraud statute and enacting it, the Senate was,  
10 at the same time, becoming concerned that this country had  
11 gone too far in extending reciprocity in connection with  
12 its tax treaties and was actually evincing a policy of  
13 cutting back on the degree to which we would assist other  
14 countries in tax enforcement.

15           And so the issue is to look at -- that the  
16 revenue rule must be used as a background principle of  
17 common law against which -- against which the revenue --  
18 excuse me, against which the wire fraud statute is --

19           JUSTICE O'CONNOR: Well, if we don't do view  
20 this case as involving some attempt to indirectly enforce  
21 Canada's tax laws -- suppose we don't view it with that  
22 lens -- then does that put it outside the so-called  
23 revenue --

24           MS. BRILL: Well, if it were not -- if it did  
25 not serve the function -- it doesn't matter what the

1 government's intent is and what is in the mind of the  
2 prosecutor, but if it did not have any effect of enforcing  
3 a foreign government's revenue rule, then, yes, it would  
4 be outside; but there are numerous ways in which this  
5 prosecution does enforce a foreign government's revenue  
6 rule. Certainly, it deters future violations. The  
7 sentence was based on the -- an estimate of the intended  
8 loss, and there was no assessment or an adjudication in  
9 Canada to determine what the amount was that was owed.  
10 And so the District Court became, essentially, part of the  
11 tax enforcement apparatus of the Government of Canada by  
12 performing that assessment in the first instance.

13           And so anytime that we impose criminal or civil  
14 liability in a manner that affects the tax policies of  
15 another country, we are enforcing that rule. If we --  
16 whether we're requiring compliance with the -- with the  
17 tax rule of a foreign country or punishing noncompliance.  
18 All of those --

19           JUSTICE KENNEDY: Is the rationale for the rule  
20 that enforcement of taxes is so unpopular that we want to  
21 minimize the exposure to -- of our judges so that they --  
22 the only thing they have to do is enforce taxes that --  
23 paid to our own government? I'm serious about that? Is  
24 that the rationale?

25           MS. BRILL: Well, I think there's a certain

1 amount of self-protection in some of the decision --  
2 decisions, surely; but the real -- the underlying purpose  
3 of the revenue rule is a recognition that foreign -- that  
4 taxes, in general, are a matter of policy. They're  
5 inherently policy-based; they're not based on contract or  
6 other kinds of commerce. They do not -- they do not  
7 assist in resolving disputes between private parties. And  
8 often they're imposed -- especially customs duties, are  
9 imposed to disadvantage other countries, and so the courts  
10 have said these are a peculiar type of law, they serve  
11 only the interest of the -- of the foreign sovereign, and  
12 there's a particular -- there's been a particular  
13 sensitivity about scrutinizing those foreign laws,  
14 potentially declaring them invalid under the foreign  
15 governments' own laws or pursuant to our own Constitution.  
16 And so revenue rules have historically been a categorical  
17 exclusion to general principles of comity through which we  
18 might otherwise recognize foreign laws or foreign  
19 judgements.

20 And the rule has come to be so entrenched, and  
21 has been so well established, that there's a whole body of  
22 background law in the tax treatise of our country, and of  
23 many other countries, that is based on our non-recognition  
24 and our non-enforcement of foreign revenue laws. So --

25 JUSTICE GINSBURG: But if we did -- if we did



1     enforce even a tax judgement of another country, there  
2     would be no U.S. law that would be violated.  You're  
3     talking about a common law, no country enforces the taxes  
4     of another.  But, at least in the Restatement of Foreign  
5     Relations now, that's put in terms of -- there's no  
6     requirement that any country enforce the tax claims or  
7     judgements of another; but neither is there any  
8     prohibition.

9             MS. BRILL:  Well, Justice Ginsburg, the current  
10    restatement is worded in -- addresses judgement  
11    specifically.  It does not -- it doesn't address un-  
12    adjudicated tax codes.  But there's always been a much  
13    greater suspicion, a much greater reluctance, to get into  
14    enforcing a claim brought by a foreign country, where that  
15    country's own processes have not been allowed to run their  
16    course and to have the initial determination.

17            There -- the restate -- the second Restatement  
18    of Foreign Relations law, which is -- was -- came out in  
19    1965 and is closer to reflecting what the law was at the  
20    time Congress enacted the wire fraud statute, says, in  
21    Section 41, Comment L, "Under the -- under the foreign  
22    relations law of the United States, courts in the United  
23    States will generally refrain from taking action to give  
24    effect to the penal or revenue laws of other states,  
25    except as provided by international agreement."  And so

1     that -- that was a statement by the -- by the propounders  
2     of the -- of the Restatement of what they -- what they  
3     believed the law was at the time.

4             Now, to the extent it's qualified, I think it's  
5     just to leave room for the fact that the Senate can  
6     promulgate treaties, or Congress can, by statute, command  
7     that courts recognize these laws. But if --

8             JUSTICE SCALIA: You don't -- you don't assert  
9     that this -- that it -- that this couldn't be done, do  
10    you? You just --

11            MS. BRILL: Not that --

12            JUSTICE SCALIA: -- assert that we shouldn't  
13    assert that we shouldn't interpret this statute to have  
14    done it.

15            MS. BRILL: Exactly, Justice Scalia. If  
16    Congress had written a different wire fraud statute that  
17    had said, "You can't have a scheme to defraud the revenue,  
18    whether foreign or domestic," that would have been a clear  
19    statement abrogating the revenue rule. But we don't have  
20    any such clear statement, and the terms -- the terms  
21    "defraud" and the terms "property" have to be read with  
22    the background rule in mind.

23            JUSTICE GINSBURG: May I --

24            JUSTICE KENNEDY: But you would come to that  
25    conclusion even if we had a reciprocal enforcement

1 agreement. If this were Country X, where we did have a  
2 reciprocal enforcement agreement, you'd come to the same  
3 conclusion, no prosecution under this statute.

4 MS. BRILL: Correct, Your Honor, because there  
5 wouldn't -- this statute wouldn't have been written to  
6 take that into account. This --

7 JUSTICE KENNEDY: So, in a sense, the revenue  
8 position is irrelevant to your -- to your secondary or  
9 your -- or your independent argument on statutory  
10 construction. The revenue rule is irrelevant to it.

11 MS. BRILL: As to just whether an unassessed tax  
12 claim --

13 JUSTICE KENNEDY: Yes.

14 MS. BRILL: -- is property, the revenue rule --  
15 the revenue rule adds a boost to it, but there are two --  
16 there are two dimensions to the property element. One is  
17 that, as I said -- and if a -- if a tax claim is not --  
18 has not been subject to an assessment, that whatever  
19 interest the government may have in that is not in the  
20 nature of property; it is simply in the nature of law-  
21 enforcement power to collect. They -- some of these  
22 revenue rule cases talk about the power to --

23 JUSTICE O'CONNOR: So tax revenues are not  
24 property, in your view.

25 MS. BRILL: Once a tax is collected, once the

1 government actually has money in its hands, and if there's  
2 a scheme to, let's say, obtain an illegal refund through a  
3 tax and -- that would be a scheme to deprive a government  
4 body of money. But a scheme to merely evade paying a tax  
5 is not something that falls within the statute, separate  
6 and apart from the revenue rule. But the revenue rule --  
7 as a result of the revenue rule, it is also the case that  
8 no state court would have recognized any property interest  
9 in a foreign sovereign, even if it had reached the point  
10 of a judgement. And so it works in both ways. The --

11 JUSTICE GINSBURG: May I ask you, Ms. Brill,  
12 something that puzzled me about this case? It is a rather  
13 peculiar use of our wire fraud statute. Are there any  
14 proceedings going on in Canada? Has there been any  
15 attempt to extradite these people?

16 MS. BRILL: Justice Ginsburg, there was an  
17 indictment that Canada issued against the Petitioners. It  
18 has charges under -- for smuggling, under Canadian law,  
19 which is Customs Act, Section 159. It charges unlawful  
20 possession of imported spirits under Excise Act 163(1)(b),  
21 disposing of goods illegally imported, in violation of  
22 Customs Act, Section 155. So Canada has its own process.

23 There has -- there has not been, to my  
24 knowledge, any request by Canada for extradition, but the  
25 treaty between the United States and Canada does include

1 revenue violations, and --

2 JUSTICE SCALIA: Presumably, if we punish this  
3 person this way, Canada wouldn't -- there's no double  
4 jeopardy, right?

5 MS. BRILL: That's correct.

6 JUSTICE SCALIA: So we'd be punishing this  
7 person for violating Canadian law, and then Canada would  
8 punish this person for violating Canadian law.

9 MS. BRILL: Yes, I haven't looked in detail at  
10 the statute of limitations provisions, but that could be  
11 the effect. And we could be punishing them much more  
12 severely than Canada would be. They have their own means  
13 of balancing what they think the appropriate balance is  
14 for these things, and certainly the wire fraud statute, 57  
15 months in our --

16 JUSTICE KENNEDY: Well, I think the government  
17 has an interest in saying, "Look, if you're going to  
18 smuggle, have your scheme up there in Canada; don't use  
19 our wire systems for fraudulent purposes. We don't like  
20 that here."

21 MS. BRILL: And if they want to pass a law that  
22 says that, because of the -- because there's a domestic --

23 JUSTICE KENNEDY: Well, they -- of course, they  
24 say that this covers it, and it seems to me that really  
25 the -- that turns on the definition of "property" --

1 MS. BRILL: Okay.

2 JUSTICE KENNEDY: -- which is an arguable point.

3 JUSTICE STEVENS: What if the -- instead of a  
4 wire fraud case, it was assault and battery? Supposing  
5 the Canadian revenue agent got inside of New York and one  
6 of your clients beat him up, would we have -- solely  
7 because he was mad at him for trying to interfere with his  
8 attempt to smuggle into Canada -- would we have to say  
9 that you can't do that, we have no jurisdiction over the  
10 assault and battery?

11 MS. BRILL: No, Justice Stevens. It's -- the  
12 question is whether you're --

13 JUSTICE STEVENS: The only purpose would be just  
14 what the purpose is here, they're trying to, you know,  
15 facilitate the smuggling operation.

16 MS. BRILL: Well, the assault and battery --  
17 whatever the assault and battery provisions are, you would  
18 be bringing the prosecution solely for that purpose; it  
19 does not have any -- the effect of applying the assault  
20 and battery statute, if there was one --

21 JUSTICE STEVENS: Interfere with Canadian's  
22 collection of their taxes. That's the only reason for it.

23 MS. BRILL: Well, I think it -- in that case, it  
24 would be -- it would be far too attenuated to reach that  
25 conclusion. There could be -- the motive of a person --

1 JUSTICE STEVENS: Why is that any more  
2 attenuated than a conspiracy carried out down here in  
3 Maryland using American assets to do the evil deed in  
4 Canada?

5 MS. BRILL: Well, but the motive of the person  
6 performing the assault and battery would be irrelevant to  
7 the prosecution as to whether they intended to do the  
8 improper touching and, in fact, carried it out.

9 JUSTICE KENNEDY: Well, why isn't the motive  
10 irrelevant here? We don't want our facilities to be used  
11 for criminal activities --

12 MS. BRILL: The question is whether --

13 JUSTICE KENNEDY: -- any more than in the -- in  
14 the hypothetical we don't want citizens beaten up on our  
15 soil.

16 MS. BRILL: Justice Kennedy, the issue is  
17 whether -- is what Congress had in mind in enacting the  
18 wire fraud statute. And, in general, we presume that  
19 Congress had domestic concerns in mind, not that we have  
20 incorporated vast bodies of --

21 JUSTICE O'CONNOR: Well, but it used broad  
22 language, "Any scheme to defraud by means of wire  
23 communications in interstate or foreign commerce."

24 MS. BRILL: The wire -- it is -- the wire  
25 communications may be an interstate or foreign commerce,

1 the word "any" modifies "any scheme or artifice to  
2 defraud" --

3 JUSTICE SCALIA: Is this statute applied against  
4 people who defraud the United States Government in taxes?

5 MS. BRILL: Your Honor, the government's  
6 position on that, I believe, is somewhat inconsistent.  
7 The tax -- the tax division and the Department of Justice  
8 U.S. Attorneys manual specifies that it is -- they believe  
9 it is the intent of Congress that tax matters will be  
10 dealt with through the internal revenue code, not through  
11 other means.

12 There are -- there have been some prosecutions  
13 brought in the case of an illegal -- an illegal tax  
14 shelter, where there is truly an -- a private party who is  
15 defrauded into giving up money in connection with --

16 JUSTICE SCALIA: But you don't -- you don't know  
17 of any prosecutions under this fraud statute for depriving  
18 the Federal Government of property.

19 MS. BRILL: Well, the Henderson case, which we  
20 have cited in the reply brief, is one from the Southern  
21 District of New York, where Judge Weinfeld said, when  
22 faced with a mail fraud prosecution of that type, this is  
23 outside the scope of anything that Congress intended.

24 The -- I would like to get back to the issue of  
25 money or property so that it -- to have it conceptually



1     why an unassessed tax claim is not money or property.  
2     There is no allegation that -- in the indictment or  
3     anywhere -- that the petitioners took any money out of  
4     Canada's treasury. So money is not an issue. At most, it  
5     was an effort to evade Canada's right to collect money,  
6     not any money it has --

7                 JUSTICE STEVENS: Ms. Brill, is this the same  
8     thing if it were a building fraud? Suppose there were  
9     contractors building a Canadian building for the Canadian  
10    Government and they had a big fraud scheme down here, and  
11    it was to deprive the Canadian Government of money? I  
12    think the statute would clearly apply.

13                MS. BRILL: The statute only applies -- what  
14    McNally said is, any assistance a governmental body  
15    obtains from the statute must be in the capacity of  
16    property-holder. And so the -- a scheme to defraud  
17    somebody out of their -- out of a building, that's  
18    traditional property. There's not -- it is not the same  
19    thing.

20                Let's have an -- let's take an example of an  
21    interference with prospective economic advantage. So  
22    there is a defendant who says to somebody else who's about  
23    to get a contract -- I know my competitor is about to get  
24    a contract, and I say, "Why don't you go out of town?"  
25    There's a -- there's a much bigger contract that you can

1 get if you fly to Michigan." And, meanwhile, I go in, and  
2 I usurp the contract and take it for my own purposes.  
3 Well, I've interfered with that person's prospective  
4 economic advantage, and so there would be a tort, and the  
5 person could collect from me. But I have not taken any  
6 money or property from that person that was in his  
7 possession.

8           And what McNally and Cleveland plaintiffs to is  
9 whether there was money or property in the hands of the --  
10 of the victim. And Canada's interest -- until there has  
11 been an assessment, Canada's interest is purely that of a  
12 -- of a sovereign. It is -- it does not have a claim to  
13 any money that is in the bank account of somebody who owes  
14 it a debt.

15           And the Johnston case, which we've cited in our  
16 reply brief, Your Honor, talks about -- this Court talked  
17 about a statute in which there was a boxing promoter who  
18 collected fees for the boxing match and also collected  
19 taxes at the same time. And the U.S. Government could not  
20 bring an embezzlement action against that person for not  
21 paying the taxes, because those taxes were not -- were not  
22 yet anything that qualified as governmental property.

23           JUSTICE STEVENS: Ms. Brill, in the Court of  
24 Appeals, they treated the argument that this was not  
25 property as entirely separate from the revenue rule

1 question. And I thought your petition for cert was  
2 confined to the first question.

3 MS. BRILL: Well, Your Honor -- no, Your Honor,  
4 we talked about both in the petition for cert. And then  
5 the question --

6 JUSTICE STEVENS: But the question, itself,  
7 doesn't refer to the property issue.

8 MS. BRILL: It talks about the --

9 JUSTICE SCALIA: Was it -- was it phrased the  
10 same way it is in your brief, in the petition?

11 MS. BRILL: Yes. Yes, the --

12 JUSTICE SCALIA: Well, then the last part of it  
13 --

14 MS. BRILL: Right, but --

15 JUSTICE SCALIA: -- obviously covers it.

16 MS. BRILL: Yes, the last part talks about --

17 JUSTICE STEVENS: Oh, I see. I'm sorry, you're  
18 right. Yeah.

19 MS. BRILL: Yes, okay.

20 But to return -- to return to the revenue rule  
21 -- and thank you, Justice Stevens, for bringing me back to  
22 that -- the government has acknowledged that there can be  
23 no restitution here. And that's in -- that's in the joint  
24 appendix, at page 106. They expressly waived it. They  
25 said that even if there was a foreign judgement that

1 Canada was trying to bring here, that would be  
2 unenforceable. There could be no RICO actions, because  
3 that's unenforceable; and no proxy suits on behalf of a  
4 foreign government. And so the only thing that they say  
5 is, beyond -- is not included -- the only act of  
6 enforcement which they say is not included is, somehow,  
7 criminal enforcement.

8           And under Section 14 of the -- excuse me, under  
9 the Fourteenth Amendment of the United States  
10 Constitution, Congress has power to enforce that  
11 amendment, and it has done so both in enacting statutes  
12 for civil recovery, as well as criminal recovery --  
13 criminal punishment, excuse me. And so it's -- the notion  
14 that somehow incarcerating someone is not -- is not  
15 punishment is not something that makes much sense in that  
16 context.

17           The decisions of this Court have held that  
18 penalties are -- monetary penalties count as punishment,  
19 and also that injunctions are -- fall within the scope of  
20 the revenue rule. That's in the Wisconsin versus Pelican  
21 Insurance case, which actually addresses the penal -- the  
22 penal rule, which is the close corollary.

23           JUSTICE GINSBURG: May I ask you, when -- now  
24 that we're getting into money, one of the things that the  
25 sentencing board had to do was to find out how much of a

1     loss there was, and that involved determining what taxes  
2     would be due under Canadian law. And did that increase  
3     the sentence? Did the -- did the sentence vary with the  
4     amount of taxes that they -- we found due?

5             MS. BRILL: Yes, Justice Ginsburg, it very much  
6     did. The loss calculation was based on intended loss, and  
7     so they -- what the District Court judge did was estimated  
8     the number of cases of liquor that were intended to be  
9     brought into Canada, and applied that number to the amount  
10    of the tax that Canada, he believed, would have applied to  
11    that -- to that amount. And that ended up changing the  
12    sentence from six months to, in the case of the  
13    Pasquantino brothers, 57 months, and the -- and, in the  
14    case of Mr. Hiltz, 21 months. So the bulk of the sentence  
15    was based on the Canadian tax law and our courts making  
16    that assessment.

17            JUSTICE GINSBURG: A judge making that  
18    assessment.

19            MS. BRILL: The judge made the sentence -- made  
20    the assessment at sentencing, yes. What the -- what the  
21    -- what the government did in this case was to submit,  
22    very self-consciously, all of the issues of Canadian tax  
23    law to the jury. And the assistant U.S. attorney said  
24    this to the Fourth Circuit en banc panel several times,  
25    that they were presenting these matters of Canadian tax

1 law as factual issues for the jury to find. But,  
2 ultimately, in sentencing, it was -- it was the court that  
3 ended up imposing and elevating that sentence.

4 If there aren't further questions, I'd like to  
5 reserve the balance of my time.

6 JUSTICE STEVENS: Mr. Dreeben?

7 ORAL ARGUMENT OF MICHAEL R. DREEBEN

8 ON BEHALF OF RESPONDENT

9 MR. DREEBEN: Justice Stevens, and may it please  
10 the Court:

11 A prosecution for wire fraud based on defrauding  
12 a foreign government of taxes serves at least four  
13 distinct United States prosecutorial interests.

14 The first is that the creation of schemes to  
15 defraud frequently spawns collateral criminal conduct in  
16 the United States above and beyond the fraudulent scheme  
17 itself. Here, for example, one of the defendants was  
18 charged in the indictment with using a gun in relation to  
19 the charged wire fraud scheme.

20 Second --

21 JUSTICE GINSBURG: Where? Using a gun where?

22 MR. DREEBEN: In the United States, Justice  
23 Ginsburg.

24 JUSTICE SCALIA: Well, why didn't you prosecute  
25 him for that?

1           MR. DREEBEN: That crime depended upon the  
2   validity of the wire fraud charges, because the crime was  
3   use of a gun during -- in relation to this wire fraud  
4   scheme.

5           JUSTICE SOUTER: But that really doesn't get you  
6   anywhere, does it? I mean, if the United States says, "We  
7   don't want this gun offense to be prosecuted unless  
8   there's a wire fraud prosecution," that doesn't tell you  
9   anything as to whether there ought to be a wire fraud  
10  prosecution.

11          MR. DREEBEN: Well, what it tells you, Justice  
12  Souter, is why the United States has an interest in  
13  enforcing a law that facially is written to cover schemes  
14  to defraud that are carried out using the United States  
15  wires.

16          JUSTICE SCALIA: But that's -- but that's a  
17  reason for extending the statute to everything. To  
18  everything.

19          MR. DREEBEN: No, Justice Scalia --

20          JUSTICE SCALIA: "Property" can mean anything at  
21  all. I mean, what you're saying is, the broader you read  
22  this statute, the more bad guys we're going to catch.  
23  I'll stipulate that. Of course it's true.

24          MR. DREEBEN: Well, Justice Scalia, I'm starting  
25  from the proposition that the language of the wire fraud

1 statute textually applies to this scheme, and Petitioner's  
2 argument is that, because of the common law revenue rule,  
3 the statute should be read to exclude schemes to defraud a  
4 foreign government of tax revenue. And the fact that a  
5 foreign government is defrauded of tax revenue does not  
6 mean that the United States does not have an independent  
7 interest in rooting out that scheme and prosecuting it.

8           In addition to the collateral criminal conduct  
9 that such schemes can spawn, the creation of such schemes  
10 indicates a criminal mind and a criminal group that can  
11 turn its techniques for used -- using to smuggle into  
12 Canada, also to smuggle back into the United States or to  
13 victimize other victims in the United States.

14           JUSTICE SCALIA: What about evading a Cuban tax  
15 law that we think -- that many people would think is an  
16 unjust tax law? I mean, one of the things I'm worried  
17 about is that this gets us into foreign policy. Are you  
18 sure that we always want to enforce the tax laws of  
19 foreign countries through this fraud statute, no matter  
20 what those tax laws happen to be?

21           MR. DREEBEN: The United States has  
22 prosecutorial discretion to determine when to invoke the  
23 statute and in what interests it should be served.

24           JUSTICE SCALIA: It may well, but when it comes  
25 here, this Court is going to have to decide -- we'll just



1 approve whatever you want to prosecute and let you not  
2 prosecute whatever you want?

3 MR. DREEBEN: There is no provision in the  
4 statute, Justice Scalia, for this Court to second-guess  
5 foreign-policy determinations that are made --

6 JUSTICE BREYER: Well, not just foreign policy.  
7 The White Russians come here because they don't want to  
8 pay Lenin's taxes designed to equalize all individuals, in  
9 terms of property. Country A has a tax law that makes  
10 everybody a criminal because nobody really ever pays all  
11 the taxes. Country C has a set of laws that tax bibles.  
12 Country D has a -- I mean, you know, we can spin out the  
13 examples endlessly, and they're not farfetched.

14 So take all the arguments from last week, called  
15 "any court arguments," cross- -- or two days ago -- just  
16 let's cross-reference them. The problem is complexity of  
17 tax law. The problem is many, many, many would be  
18 contrary to American policy. And the problem is, nobody  
19 really knows what they are; indeed, they don't even know  
20 what American tax law is, no single individual, I suspect.  
21 Let's put in Italy, France, Byelorussia, Belarus, Ukraine,  
22 Saudi Arabia, and 35,000 others. Everybody becomes a  
23 criminal. And then we say, "Don't worry, we'll only  
24 prosecute the real bad ones." That's the argument, I  
25 think, on the other side, and I'd like to hear your

1 perspective.

2 MR. DREEBEN: Justice Breyer, I don't think  
3 there's any reason to assume that everyone becomes a  
4 criminal. What this --

5 JUSTICE BREYER: No, only people who come over  
6 here because they don't want to pay taxes in those  
7 countries. Sometimes we would agree with them --

8 MR. DREEBEN: Justice Breyer, in order to  
9 violate the wire fraud statute, you have to use deception  
10 in order to deprive another --

11 JUSTICE BREYER: Yes, they don't tell Lenin that  
12 they're coming --

13 MR. DREEBEN: Well, that wouldn't involve the  
14 use of the United States wires --

15 JUSTICE BREYER: -- and they write to each  
16 other. They have a cousin, in Brooklyn, who forwards them  
17 the money to get out.

18 MR. DREEBEN: Justice Breyer, if one stipulates  
19 that that violates the wire fraud statute or that there's  
20 enough conduct that does, the question still comes down to  
21 whether the United States chooses to prosecute that case.  
22 This is not a --

23 JUSTICE BREYER: So the question comes down to  
24 --

25 JUSTICE SCALIA: The question comes down to

1 whether this statute, which doesn't have to be read that  
2 way, ought to be read that way, whether it makes sense to  
3 read it that way. What about -- does Canada have an  
4 income tax?

5 MR. DREEBEN: I'm not sure of Canadian tax law.

6 JUSTICE SCALIA: Well, let's assume --

7 MR. DREEBEN: In the context of this case --

8 JUSTICE SCALIA: -- Canada has an income tax.  
9 Would you -- would you prosecute a Canadian who files a  
10 deceptive Canadian income tax return?

11 MR. DREEBEN: Not for using Canadian facilities  
12 to do so.

13 JUSTICE SCALIA: No, no, no, from this country.  
14 He's -- you know, he's a snow goose and is in Florida when  
15 he files his return.

16 JUSTICE SOUTER: He files it electronically.

17 JUSTICE SCALIA: Yeah.

18 MR. DREEBEN: The wire fraud statute is  
19 applicable to schemes to defraud, generally speaking. The  
20 questions in this case are whether there is a common law  
21 rule that should be read to provide background.

22 JUSTICE BREYER: -- reason for it. I just --  
23 you don't seem to know completely about Canadian law. How  
24 much do you know about the tax law of Vietnam? Because  
25 Los Angeles is filled with Vietnamese refugees, many of

1 communities of such people in the United States. Do we  
2 know how many of them perhaps might owe taxes under the  
3 law of Vietnam, and maybe are talking to each other about  
4 whether they really want to pay it?

5 MR. DREEBEN: I don't think this is a realistic  
6 problem, Justice Breyer, that should require the court not  
7 to read a statute whose language --

8 JUSTICE BREYER: Well, what about the wealth tax  
9 in France?

10 MR. DREEBEN: There are a variety of taxing  
11 schemes all across the world. The question that the  
12 United States has to make when it determines whether to  
13 prosecute a wire fraud scheme is whether it's in interest  
14 -- in the interest --

15 JUSTICE STEVENS: Mr. Dreeben, at the beginning  
16 of your argument, you said there were four federal  
17 interests you were going to identify. You've been able to  
18 identify one -- you know, on running around with guns.  
19 What are the other three?

20 MR. DREEBEN: The other three are --

21 JUSTICE SCALIA: Second --

22 MR. DREEBEN: The second one, which I began to  
23 allude to before hearing some questions about --  
24 question.

25 MR. DREEBEN: -- are that people who engage in

1 schemes in this country are capable of then using the same  
2 techniques against victims in this country. The third  
3 reason is that the creation of international schemes to  
4 defraud, like the smuggling scheme in this case, poses  
5 independent threats to the United States Government  
6 because international criminal organizations are  
7 particularly difficult for the United States to deal with.  
8 And the fourth reason is that it is an offense to a  
9 foreign government, the United States Executive Branch may  
10 conclude, to allow our soil and our wires to be used to  
11 perpetuate a smuggling scheme against a foreign government  
12 with the United States doing nothing about it.

13 JUSTICE GINSBURG: Well, if we're concerned  
14 about offending the foreign country, then isn't the way to  
15 go, in fact, the way Congress has gone in this area, we  
16 negotiate treaties? I mean, one of the reasons why we go  
17 the treaty route are the kind of problems that Justice  
18 Breyer brought up, we want to have reciprocal treaties.  
19 We want two things. We want to make sure that it's a  
20 basically fair system that we're dealing with. On the  
21 other hand, we want to say, "If we do anything with  
22 respect to your taxes, we want to make sure that we get  
23 the same benefit from you with respect to ours."

24 So never mind the revenue rule, isn't it  
25 pervasive that -- when it comes to enforcing tax claims,

1     that the route that Congress has chosen to go, and the  
2     Executive, as well, has been the treaty route?

3             MR. DREEBEN:   Justice Ginsburg, those are tax  
4     treaties designed to mutually assist the countries to  
5     collect taxes.   This is a prosecution directed at fraud.  
6     The collection of taxes in a cooperative, reciprocal  
7     manner between governments implicates very different  
8     interests than the United States has when it seeks to  
9     combat people who have intended to devise, or have  
10    devised, a scheme to defraud in the --

11            JUSTICE GINSBURG:   One of --

12            MR. DREEBEN:   -- United States.

13            JUSTICE GINSBURG:   -- one of -- one of the last  
14    interests that you mentioned, about offending foreign  
15    governments, well, on the face of this, it would seem, the  
16    one that -- the country that's been done out of taxes is  
17    Canada, not the United States.   So, we should help Canada,  
18    if it's interested in collecting revenue from these people  
19    or trying them for a criminal offense, to do that.   It --  
20    I asked Ms. Brill, Have they been indicted in Canada?   She  
21    said yes, but she said it's -- they had not -- there has  
22    not been a request for extradition.   Is that -- is that --

23            MR. DREEBEN:   That's my understanding, as well,  
24    Justice Ginsburg.   And the pursuit of this prosecution by  
25    the United States reflects that when United States

1 citizens engage in fraudulent conduct on our soil, our  
2 government has a distinct interest, from Canada's  
3 interest, in pursuing the prosecution of this case.

4 JUSTICE SCALIA: How long has this statute been  
5 on the books, this wire fraud statute? Pretty old  
6 statute.

7 MR. DREEBEN: 1952. And its antecedents are the  
8 mail fraud statute, which was enacted in 1872.

9 JUSTICE SCALIA: How many prosecutions like this  
10 have there been? When was the first one?

11 MR. DREEBEN: This --

12 JUSTICE SCALIA: For, you know, using the mails  
13 or interstate commerce to defraud a foreign government of  
14 taxes?

15 MR. DREEBEN: This type of prosecution became  
16 more common in the 1980s when Canada greatly increased its  
17 taxes on importation of tobacco and alcohol.

18 JUSTICE SCALIA: More common, or didn't exist at  
19 all before the 19- -- do you know of any case before --

20 MR. DREEBEN: No, I'm not aware of any case  
21 before --

22 JUSTICE SCALIA: -- before the 1980s.

23 MR. DREEBEN: That's right.

24 JUSTICE SCALIA: Doesn't that suggest to you  
25 that the statute isn't naturally read to cover stuff like





1 close question whether we're enforcing the tax laws of  
2 Canada by prosecuting somebody for violating the tax laws  
3 of Canada, if that's a closed question, why doesn't the  
4 rule of lenity apply?

5 MR. DREEBEN: Well, if the Court concluded that  
6 the question was not susceptible of resolution by resort  
7 to the usual tools of statutory construction, then you  
8 would apply the rule of lenity. But it's our submission  
9 that neither of these two theories --

10 JUSTICE STEVENS: But may I ask this question?  
11 I think you have conceded, in a footnote -- and maybe  
12 you're -- almost conceded -- that if this were a RICO  
13 case, a civil RICO case, that the Congress enacted the  
14 RICO statute against this background rule and that perhaps  
15 the RICO case could not go forward. What if it were a  
16 federal RICO case and -- the same facts -- would the RICO  
17 statute be qualified by the revenue rule?

18 MR. DREEBEN: No, it would not, Justice Stevens,  
19 and that's because of the precise distinction that I drew  
20 in response to Justice Scalia's question. This is a suit  
21 by the United States Government, as Plaintiff, not by a  
22 foreign government, as Plaintiff or prosecutor. The  
23 revenue rule is essentially concerned with interests of  
24 sovereignty. One foreign government should not be able to  
25 come into our courts and enforce its sovereign power by

1 using our courts to collect taxes from our citizens.

2 JUSTICE BREYER: What about the other reasons  
3 underlying it, which is what I was trying to get at  
4 before? I see, literally, that the common law -- you  
5 know, the enforcement -- this is not literally  
6 enforcement. So what I was driving at with my questions  
7 is, even though literally it's not, the problems of  
8 complexity, the problems of knowability, and the problems  
9 of there being so many, many foreign tax laws that we  
10 might think are basically unfair, that those  
11 considerations apply here, just as they do with the  
12 enforcement rule, and then add the fact that turning  
13 people into criminals under threat of prosecution by the  
14 Federal Government is really very much equivalent to  
15 enforcing the foreign rule in a court. I mean, that's the  
16 whole thing spelled out. And I meant it seriously, though  
17 I used foreign examples to, sort of, drive the point home.

18 What is your response to that?

19 MR. DREEBEN: Well, Justice Breyer, first of  
20 all, the complexity of foreign tax law is something that  
21 would defeat a federal prosecution in which we need to  
22 show specific intent to defraud if the law were not  
23 sufficiently clear for us to be able to meet that burden.  
24 This case illustrates the kind of prosecution that will be  
25 brought. There are taxes that are due upon the

1 importation of alcohol. The Petitioners arranged, through  
2 the wires, to bring alcohol from Maryland up to New York,  
3 and then they got it across the border by not answering  
4 questions when asked by customs officials and by not going  
5 to secondary inspection when they were asked. In order to  
6 bring a criminal prosecution that requires specific intent  
7 to defraud, the government is not going to be relying on  
8 obscure systems.

9           As to the concern about the enforcement of tax  
10 systems that the United States may believe are -- is  
11 unfair, that is the prerogative of the Executive Branch to  
12 determine in deciding whether a prosecution should be  
13 brought in a particular case. This Court has repeatedly  
14 recognized that the Executive Branch is the preeminent  
15 branch in the area of foreign affairs --

16           JUSTICE GINSBURG: To go to one more aspect of  
17 the statute which I don't think you've addressed, Congress  
18 said that -- with respect to the wire fraud and mail fraud  
19 and, I think, other things -- that restitution to the  
20 victim is mandatory, that it's not left up to the  
21 government to decide restitution or not. Except here  
22 restitution sounds very much like enforcing Canada's  
23 taxes, so you have conceded no restitution. But it seems  
24 to me that Congress thought of the wire/mail fraud  
25 statutes as cases in which there would be restitution, and

1     that suggests that they didn't envision foreign taxes to  
2     be the object of the scheme to defraud.

3 MR. DREEBEN: Justice Ginsburg, the syllogism  
4 doesn't track, because the entire scope of the revenue  
5 rule, as defined in the common law cases that can be  
6 pointed to as the background principle, has to do with a  
7 foreign government, or someone acting on its behalf,  
8 coming into this country's courts to enforce its tax  
9 rules. Here what you have is the United States Government  
10 determining that it is in the interest of the United  
11 States to bring a criminal prosecution.

12 Now, in this case, the prosecutor did concede  
13 below that restitution was not appropriately ordered.  
14 That's not the position of the United States. The  
15 position of the United States is that restitution under  
16 the mandatory statute should be ordered and it does not  
17 infringe the revenue rule. But there are --

18 JUSTICE GINSBURG: Now, how could that be,  
19 because restitution is to the victim? The victim is  
20 Canada. You collect Congress -- or Canada's tax, and you  
21 give it to Canada. Is there any other kind of  
22 restitution?

23 MR. DREEBEN: No, there isn't, Justice Ginsburg,  
24 but the revenue rule isn't of such a broad scope that it  
25 applies to efforts by the United States Government to

1 secure punishment by -- for a criminal conviction.

2 But, Justice Ginsburg, if the Court were to  
3 disagree with that and were to believe that restitution,  
4 even when it's been sought by the United States -- not by  
5 a foreign government, in its own right, with the power to  
6 instigate a lawsuit -- but that even when the United  
7 States does it, that somehow falls within the parameters  
8 of the common law revenue rule, then the answer to that  
9 problem would be to interpret the restitution statute  
10 against the background of the revenue rule, not to  
11 interpret the wire fraud statute against the background of  
12 the revenue rule and hold that a prosecution by the United  
13 States is wholly barred.

14 The Petitioner's submission here is really  
15 rather --

16 JUSTICE SCALIA: The restitution statute is not  
17 ambiguous at all; whereas, this statute has a number of  
18 ambiguities in it. And if I had to find my way out of the  
19 restitution problem, I would pick the ambiguous statute to  
20 get out, rather than simply saying, "Well, though this  
21 restitution statute says this categorically, we will  
22 ignore it, because if we didn't ignore it, we would be  
23 enforcing the revenue laws of another country." There's  
24 nothing against enforcing the revenue laws of another  
25 country, if we want to; this is just a question of

1 statutory interpretation. Should this ambiguous statute  
2 be interpreted that way? If Congress said, "We're going  
3 to enforce Canada's tax laws," there's nothing wrong with  
4 that. But --

5 MR. DREEBEN: Justice Scalia --

6 JUSTICE SCALIA: So you have two statutes. One  
7 of them seems to be quite ambiguous. The other one is  
8 categorical, you get restitution in all cases. Now, how  
9 do I wiggle out of it?

10 MR. DREEBEN: There's a difference --

11 JUSTICE SCALIA: -- Obviously, I wiggle out of  
12 it with the ambiguous statute.

13 MR. DREEBEN: -- there's a difference, Justice  
14 Scalia, between an ambiguous statute and a broad statute.  
15 The wire fraud statute is unequivocally broad, and it has  
16 been so interpreted. It's not ambiguous on the question  
17 of whether it applies to schemes to defraud that may  
18 involve foreign victims; it says "any scheme to defraud."  
19 And I think, as Justice Kennedy's questions pointed out  
20 earlier, if there were a scheme to defraud a foreign  
21 business interest in Canada or a foreign governmental  
22 interest in Canada relating to some commercial venture,  
23 the wire fraud statute would apply, and --

24 JUSTICE BREYER: What about -- what about a  
25 scheme --

1 JUSTICE SCALIA: But you haven't told me -- you  
2 haven't told me how you get out of the restitution  
3 statute. There's no ambiguity there, and it is not a rule  
4 of law that you can't -- it's unconstitutional to enforce  
5 the tax laws of Canada. Since it's entirely feasible, and  
6 since the text is categorical, how do you get out of the  
7 restitution statute?

8 MR. DREEBEN: Here is how I get out of it,  
9 Justice Scalia. If you think, as I do not, that the  
10 revenue rule would bar restitution at the behest of the  
11 United States in a criminal prosecution, there is a  
12 background principle that says when there is an  
13 established rule of the common law, Congress legislates  
14 against that background, and unless it makes its intent  
15 clear and unequivocal to overcome that background rule of  
16 the common law, then the statute will not be interpreted  
17 to be in derogation of it. It was that principle that  
18 formed the basis for the government's view that Canada  
19 cannot come in under the RICO statute --

20 JUSTICE GINSBURG: Well, that view is in --  
21 somewhat in tension with your view that the common law  
22 revenue rule doesn't stand in the way of this prosecution.  
23 Because you have to interpret the statute in light of the  
24 general rule that one country doesn't mess with another  
25 country's taxes, absent a treaty.

1           MR. DREEBEN: Well, Justice Ginsburg, there is  
2 no common law rule that one country doesn't "mess with"  
3 another country's taxes. What there are, are a set of  
4 cases that deal with specific problems in which foreign  
5 taxes were at issue. And in all of the 20th century  
6 versions of this problem, what you had is a foreign  
7 government or an entity, acting at the behest of a foreign  
8 government, coming into another country seeking to use  
9 that country's courts to enforce its own tax rules. And  
10 in that context, the justifications for saying that one  
11 country will not enforce another country's revenue laws  
12 have to do with the sovereignty interests of the host  
13 country.

14           One country, when it seeks to obtain revenue to  
15 carry out its own governmental policies, is doing  
16 something fundamental to its sovereign existence, and  
17 there's no obligation of the United States to assist the  
18 foreign government in using its court system to achieve  
19 those independent sovereign aims. No prohibition on it,  
20 either. As Justice Scalia pointed out, it's not  
21 constitutional, if Congress wanted to allow it. But  
22 countries, historically, have not. And that principle  
23 does form an important backdrop --

24           JUSTICE BREYER: Have countries also -- just --  
25 here, I don't know, in respect to the principle -- would



1     it have been viewed as contrary to the principle if a  
2     country were to pass a law -- say, England were to pass a  
3     law saying it is a crime in England not to pay French  
4     taxes? I'm not saying they couldn't do it; I'm just  
5     saying, Would a law like that, saying it is a crime in  
6     England not to pay French taxes -- would it have been  
7     viewed as contrary to an abrogation of -- or a -- you  
8     know, whatever you call it -- a derogation from the common  
9     law revenue rule?

10               MR. DREEBEN: I think that that's essentially  
11     the same question in this case, with the one significant  
12     difference that here there is a domestic --

13               JUSTICE BREYER: But do you see why I want to  
14     characterize it? I mean, would you characterize -- my  
15     criminal statute's absolutely clear -- the clear is, it is  
16     a crime in England not to pay French taxes. Now, would  
17     you, or would scholars, or whoever, view about the common  
18     law revenue rule, would they have said, "There is a  
19     derogation from the common law revenue rule," or would  
20     they have said, "It has nothing to do with it"?

21               MR. DREEBEN: Well, I don't know what scholars  
22     would have said about it --

23               JUSTICE BREYER: No, what would you have said?

24               MR. DREEBEN: -- but this is what I would say  
25     about it.

1 JUSTICE BREYER: Yeah.

2 MR. DREEBEN: When you're dealing with the  
3 principle that a statute of the United States will not be  
4 construed to be in derogation of a common law unless it's  
5 clear that that's its purpose, the court should be very  
6 careful in defining what the parameters of the common law  
7 are. The court should not take a common law rule and  
8 treat it as some dynamic entity that has capability of  
9 growing a dimension that is not consistent with its  
10 purposes and that it had never assumed in any decided case  
11 as a means of telling Congress, "You can't do what you  
12 have done."

13 So I would say, Justice Breyer --

14 JUSTICE SCALIA: We haven't told -- no, no, no,  
15 no, no, no, we're not telling Congress, "You can't do what  
16 you have done." We're saying, "Congress hasn't done  
17 this."

18 MR. DREEBEN: Well, the only reason you would  
19 say that Congress hasn't done it, Justice Scalia, is if  
20 you concluded that -- and I would ask the Petitioners what  
21 their best citations are, because I haven't been able to  
22 find them -- what cases indicate that a country cannot  
23 bring the kind of prosecution that the United States did  
24 here to vindicate its own independent sovereign --

25 JUSTICE BREYER: Nobody says they can't do it.

1 That's why I asked you my question. My question is simply  
2 whether you would consider an absolutely clear law -- "We  
3 will -- we -- it is a crime not to pay your French taxes."  
4 I'm asking whether you would consider that -- I'm not  
5 saying they can't do it; I just want to know -- would it  
6 be in derogation of the common law principle?

7 MR. DREEBEN: It would probably be in derogation  
8 of a more --

9 JUSTICE BREYER: That's where --

10 MR. DREEBEN: -- fundamental principle.

11 JUSTICE BREYER: Oh.

12 MR. DREEBEN: Not the revenue rule --

13 JUSTICE BREYER: Not the --

14 MR. DREEBEN: -- but a more fundamental  
15 principle that one country usually does not legislate with  
16 respect to extraterritorial acts.

17 JUSTICE BREYER: That would be another one, too.

18 MR. DREEBEN: But if you --

19 JUSTICE BREYER: Because the -- I -- that's why  
20 I want to know --

21 MR. DREEBEN: But that's not applicable here,  
22 either, Justice Breyer, because the crime involves wire  
23 fraud in the United States.

24 JUSTICE SOUTER: Yeah, but why is it ethical, to  
25 the extent that there seems to be a mandatory obligation

1 to order restitution? And it seems to me that the  
2 restitution that would be ordered would be just as much in  
3 derogation of the common law principle as the out-and-out  
4 collection in Justice Breyer's example.

5 MR. DREEBEN: Justice Souter, again, to say that  
6 it's in derogation of the common law principle assumes  
7 that the common law principle has applicability to one  
8 country seeking to vindicate interests of its --

9 JUSTICE SOUTER: Well, but I -- a moment ago,  
10 you said, "Okay, we'll assume that there would be some  
11 derogation," in Justice Breyer's example. I don't see why  
12 you don't come to the same conclusion with respect to the  
13 restitution aspect here.

14 MR. DREEBEN: Because the derogation that I was  
15 talking about with respect to Justice Breyer is punishing  
16 conduct that occurs entirely extraterritorially. This is  
17 not conduct that occurs entirely --

18 JUSTICE SOUTER: Yeah, but the revenue -- the  
19 revenue rule does not rest simply on the rationale of non-  
20 extraterritorial enforcement. It has -- it has other  
21 rationales: difficulty of understanding what the revenue  
22 rule is; the -- you know, the problems of policy; there  
23 are lots of revenue rules in foreign countries that we  
24 certainly wouldn't want to enforce, and so on. It's not  
25 just extraterritoriality. In those -- those policies

1 would be just as much implicated by the -- by the  
2 restitution as by the out-and-out enforcement in Justice  
3 Breyer's example.

4 MR. DREEBEN: Well, Justice Souter, I think that  
5 the policies underlying the revenue rule are narrower than  
6 the ones that you have articulated; but, even more to the  
7 point, they are not justifications that found their way  
8 into any holdings that would leave a reasonable legislator  
9 in 1952, when the wire fraud statute was enacted, to  
10 conclude that this is a rule that I'm going to have to  
11 specifically --

12 JUSTICE SCALIA: Well, perhaps --

13 JUSTICE SOUTER: Well --

14 JUSTICE SCALIA: I'm sorry.

15 JUSTICE SOUTER: Go ahead.

16 JUSTICE SCALIA: No, no problem.

17 JUSTICE SOUTER: I was going to say, perhaps  
18 there were no specific holdings, because it would have  
19 been regarded as, kind of, a bizarre derogation of the  
20 rule in the first place. Nobody had dreamed up this  
21 scheme earlier.

22 JUSTICE SCALIA: I was about to say the same --  
23 the same thing. You keep saying there are no cases that  
24 do this. Are there -- are there -- are there cases,  
25 before 1980, which do what you want to do -- that is, to

1 use our fraud law, or something, to effectively enforce  
2 Canada's -- or some foreign country's tax law?

3 MR. DREEBEN: No, but what I would say about --

4 JUSTICE SCALIA: No.

5 MR. DREEBEN: -- the revenue rule is that it is  
6 a shrinking principle of the common law, not one that has  
7 been growing. It originally started out as a principle  
8 that allowed countries to avoid invalidating contracts  
9 that they believed were in furtherance of commerce. It  
10 gradually came under attack, because what it said is that  
11 the United States will not notice that a foreign country's  
12 laws have been violated in the formation of a contract,  
13 and so the contract will be enforced. Commentators  
14 recognized that that was contrary to principles of comity  
15 and recognition that each country does have a reciprocal  
16 interest in acknowledging each other's laws.

17 In the 20th century, those contract cases  
18 completely drop out of the picture, and what becomes left  
19 are sovereignty cases where a country is seeking to exert  
20 its sovereign power inside the United States or inside a  
21 foreign country -- the United States, itself, tried it  
22 once in Canada -- to collect taxes. And countries said,  
23 "We're not going to do that. We're going to leave it to  
24 the treaty process."

25 But the rationales that Justice Breyer and

1 Justice Souter have articulated, about complexity of  
2 foreign law and odious foreign tax systems, have never  
3 been the driving force behind the revenue rule. It's been  
4 --

5 JUSTICE BREYER: I got your point. I think it  
6 is the -- in my answer -- in my clear example, you would  
7 say no, that's not in derogation for the reason that  
8 there's an independent local reason for doing it. It's  
9 not being done to -- whether it has that effect or not,  
10 it's not being done in order to collect the foreign tax.

11 MR. DREEBEN: That's right.

12 JUSTICE BREYER: That's been your response  
13 throughout.

14 MR. DREEBEN: That is correct.

15 JUSTICE BREYER: Okay, I --

16 MR. DREEBEN: What you have instead is a law of  
17 the United States that's enacted to serve perfectly valid  
18 interests that the United States Government has in rooting  
19 out fraud in this country and in dealing with schemes to  
20 defraud that are created here. And for the court to say  
21 that, "We don't like these kinds of prosecutions, because  
22 we're concerned about really bad foreign tax systems, and  
23 we're concerned about complicated law, and we're concerned  
24 that some common law rule that had never actually assumed  
25 the scope that Petitioners ascribed to it, should be

1     formed -- read as the background principle for the  
2     interpretation of this statute" is not a principle that  
3     finds any support in the construction of federal --

4             JUSTICE GINSBURG:   Mr. Dreeben, can I ask you --  
5     this is such a curious case.  You were very candid in  
6     telling us that when Canada put these astronomical taxes  
7     on tobacco and alcohol, that was almost an invitation to  
8     smugglers.  Did we have any discussions with Canada -- I  
9     mean, they do have that border, which is rather easy to  
10    cross -- about what we were going to do when they put the  
11    taxes on liquor sky-high?

12            MR. DREEBEN:  I am not aware, Justice Ginsburg,  
13    of what specific law enforcement conversations occurred,  
14    but I can tell you that there is extensive law enforcement  
15    cooperation with Canada, as a close neighbor, and that the  
16    interests of the United States very much do favor our  
17    policing against smuggling here, and Canada policing  
18    against smuggling there.

19            Thank you.

20            JUSTICE STEVENS:  Thank you, Mr. Dreeben.

21            Ms. Brill, you have four-and-a-half minutes  
22    left.

23                    REBUTTAL ARGUMENT OF LAURA W. BRILL

24                            ON BEHALF OF PETITIONERS

25            MS. BRILL:  Thank you.



1           The common law cases universally say that it  
2   does not matter who is bringing the claim. It can be the  
3   foreign government or it can be another person.

4           JUSTICE STEVENS: Can I just ask you to tell us  
5   what your strongest case is? Because they did raise that  
6   question.

7           MS. BRILL: Sure. On the -- on the issue of the  
8   identity of the person bringing the claim, the contract  
9   cases, Holman and Boucher, stand for that proposition, and  
10   the Peter Buchanan case, which came down in 1950, just  
11   before the wire fraud statute was enacted -- this was in  
12   the Appellate Court in Ireland -- it says, "It is not a  
13   question whether the plaintiff is a foreign state or the  
14   representative of a foreign state or its revenue  
15   authority. In every case, the substance of a claim must  
16   be scrutinized. And if it then appears that it is really  
17   a suit brought for the purpose of collecting the debts of  
18   a foreign revenue, it must be rejected." That's at 1955  
19   A.C. 529.

20           And so with the -- with the Mandatory  
21   Restitution Act, this clearly is something to collect the  
22   debts of a foreign nation. And the sentencing scheme that  
23   Justice Ginsburg alluded to earlier, in which the  
24   sentences were enhanced based on the intended loss,  
25   demonstrate that this is an enforcement action.



1 found -- any example of a criminal prosecution -- not just  
2 in this country; anywhere in the world -- to -- deriving  
3 from the violation of a foreign government's tax. And so  
4 --

5 JUSTICE SOUTER: You're saying, in effect, that  
6 derogation is an effects test, not an intent test.

7 MS. BRILL: Yes, Your Honor. Yes, Justice  
8 Souter.

9 And the -- in terms of what the government's  
10 interests are, there were no deceptive acts in this  
11 country. The way the government gets a material  
12 misstatement is by a failure to disclose at the Canadian  
13 border, which only -- even though they did not put in  
14 evidence of what the -- that Canada even had a law  
15 requiring disclosure, the only way there could have been  
16 any kind of material misstatement would be if Canadian law  
17 required it, not if -- not anything that happened in the  
18 United States.

19 In Cleveland, the court was very clear to point  
20 out -- one of the reasons to adopt a rule of lenity in  
21 interpreting the mail fraud statute and the wire fraud  
22 statute is because violations serve as a predicate for  
23 RICO actions and for money-laundering violations. And so  
24 what the government's position is, is that we should carve  
25 out this ad-hoc exception and allow wire fraud

1 prosecution, even though we would not allow any kind of a  
2 civil RICO action and even though we're going to have an  
3 ad-hoc exception for the Mandatory Victims Restitution  
4 Act. But what the court said in Cleveland is, the way we  
5 should do this is by adopting a proper interpretation in  
6 the first place, not by -- of the wire fraud statute --  
7 not by having ad-hoc exceptions.

8           And the reference to prosecutorial discretion  
9 that there should be faith that the government will only  
10 prosecute, I guess, what the government regards as  
11 exceptional cases is not something that can provide any  
12 business involved in an international transaction with any  
13 -- with any comfort.

14           And thank you very much.

15           JUSTICE STEVENS: Thank you. The case is  
16 submitted.

17           (Whereupon, at 12:13 p.m., the case in the  
18 above-entitled matter was submitted.)

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